VIRGINIA LAW REGISTER.

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WE have a number of articles on hand awaiting publication. Contributors are requested not to become impatient. It is hoped that this announcement will not interrupt the flow of valuable and interesting papers that have been coming in during the summer vacation.

THERE has been brought to our attention, from several sources, a report, said to be prevalent in the State, that one or more graduates of the Law Department of the University of Virginia failed on the recent bar examination before the Supreme Court of Appeals. We speak by authority when we say that no graduate of the University has failed to pass the examination since the present system of examination by the Court of Appeals was inaugurated. The small number of graduates from this school appearing in the list of successful applicants published in our August number is attributable to the fact that most of the applicants from the University Law School were admitted at the previous March examination, while still undergraduates.

The editor of this journal is connected with the Law School of the University. He is, however, averse to using the editorial pages of the magazine to advertise his own Law School. His policy has been, and will continue to be, to give equal prominence to the other excellent law schools of the State, in the columns of the REGISTER. But he feels that the report in question does such injustice to the Law School of the University, in which he takes a pardonable pride, that this public statement of fact may not be without justification.

THE opinion of the Virginia Court of Appeals in *Wilson* v. *Hundley*, published in full in this number, passes upon several questions of interest and importance in connection with subscriptions to the capital stock of corporations. The opinion by Judge Riely is a learned one, and will repay careful study.

One point decided is of special interest, as it seems not before to

have been distinctly passed upon by any American court, and that is, that one who has been induced by false representations to subscribe for shares in a corporation, and who, after knowledge of the fraud, has ratified his subscription so that he cannot rescind, will not be permitted, after the insolvency of the company, to maintain an action at law to recover damages for the deceit.

At first view this doctrine would seem to be erroneous. It is an elementary principle of the law of ordinary contracts, that one who has been induced to enter into a contract by fraudulent representations, has two remedies: He may either rescind, and recover the consideration paid, or he may ratify and recover damages for the deceit. But the contract of subscription for shares is peculiar. It is not with the corporation alone, but, in a certain sense, with other shareholders and with creditors as well. In contemplation of law, one who knowingly permits his name to remain upon the list of shareholders, holds himself out to creditors as legally bound for the full amount of his subscription. Creditors without knowledge of defenses by which he may seek to defeat a recovery of his subscription, are presumed to rely upon his undertaking to contribute his full quota. It has long been settled that such a subscriber, where he has a right to rescind, must do so before the rights of creditors have attached. To hold that the subscriber cannot rescind to the injury of creditors, and yet to permit him to accomplish practically the same result by a recovery of damages for the deceit with which to offset his subscription, would be both illogical and unjust, and would in most cases wholly avoid the effect of ratification and the rule that it is too late to rescind after insolvency of the corporation. The conclusion reached by the court is sustained by several English decisions, cited in the opinion, and seems to be eminently sound.

Now that the efforts of the Bar Association towards reform in the matter of admission to the bar in this State, are bearing such good fruit, thanks to the wise and sympathetic co-operation of the judges of the Supreme Court of Appeals, it may not be amiss to call attention to the need for still further reforms in this connection.

The reform already inaugurated was made possible by amending section 3191 of the Code. This section, both in its original and amended form, seems not to apply to such candidates for admission as have been previously admitted in some other State. Section 3192 provides that "any person, duly authorized and practising as counsel

or attorney at law in any State or Territory of the United States, or in the District of Columbia, may practise as such in the courts of this State."

As far as we are aware, this section has not been judicially interpreted, but we believe it is generally understood by the profession as authorizing any duly licensed and practising attorney of another State not only to appear in special litigation in the courts of this State, while retaining his domicil elsewhere, but to permanently reside and practise in this State, without further examination. The amendment of section 3191, already noticed, would seem to make no change of the law in this respect; both sections must be construed together; and therefore, notwithstanding the high qualifications exacted of our own young men who desire to be licensed to practise, we accept as a sufficient passport to the coveted honor, a license issued by any State of the Union, regardless of its standard or of the qualifications of the applicant.

Comity requires that we permit any reputable non-resident attorney to appear in our courts in particular cases, but it does not require us to go beyond this. In many of the States, particularly in the South and West, the standard of admission is notoriously low, and the examinations are mere farces.

Several cases have been brought to our attention where young men, who were residents of Virginia, fearing to run the gauntlet of our Court of Appeals, have stepped across the State line into a neighboring State, where the standard of admission is far less rigorous than our own, and have returned with licenses to practise—licenses which, according to what appears to be the law in this State, are entitled to the same faith and credit here as those issuing from our own Court of Appeals.

We hope the next legislature will remedy this radical defect in our system. New York, we believe, admits without examination only those who have been regular practitioners of another State for at least five years.

DEVISEE OR LEGATEE AS AN ATTESTING WITNESS.—In *Davis* v. *Davis* (W. Va.), 27 S. E. 323, there is an elaborate discussion of Code of W. Va., ch. 77, sec. 18 (the same as Code of Va., sec. 2529), and it is held that if a will can be proved at the probate independently of the testimony of an attesting witness beneficially interested therein, a devise or bequest to such witness, or her husband, is

not void. In this case, the will of Charles W. Davis was attested by Mrs. Delilah Davis, to whom and to whose husband, devises and bequests were made. The other subscribing witness (two being required) took nothing under the will. The will was probated upon the testimony of the disinterested witness; and a bill to declare void the legacies and devises to Delilah Davis and her husband was dismissed. The decision was placed on two grounds: (1) That there were two competent witnesses at the time of the attestation of the will; (2) That a will must be subscribed, but need not be proved, by two attesting witnesses, even though the other attesting witness be alive and within the jurisdiction of the court. Hence, as in this case, the will *was* "otherwise proved," viz., by the other attesting witness, Mrs. Davis was not needed as a witness at the probate, and so her interest and that of her husband was not forfeited.

Upon the first point, it is conceded by the court that under the statute (Code of W. Va., ch. 77, sec. 18; Code of Va., sec. 2514), there must be two witnesses *competent at the time of the attestation.* But the court says: "The only reasonable way to construe secs. 3, 18, ch. 77, Code [Code of Va., secs. 2514, 2529], is that the word 'competent,' as used in each one of them, refers to the separate time to which they relate; the first to the attestation, the second to the proof of the will. Mrs. Davis was competent as an attesting witness. While she was interested in the will, the testator was alive, and if the question of the attestation had arisen during his life, they were both competent to testify in relation thereto. Hence, the word 'competency,' in so far as it relates to an attesting witness, excludes the question of interest, and has reference to age, sanity and moral integrity. As used in the eighteenth section, in relation to the proof of the will, it has reference merely to the question of beneficial interest, its object being to remove all motive for false swearing or forgery, and also the incompetency of the witness, occasioned by the death of the testator, thus throwing on the beneficiaries thereunder the burden of sustaining the will independently of their own testimony. If the will can be thus sustained, it is sustained as a whole, and not in parts, and none of the provisions are void, but all the beneficiaries take under it, even though the attesting witnesses were incompetent [*i. e.*, to testify at the probate] on account of interest. . . . The will is fully established by the other attesting witness. It might have occurred that the will could not have been established without the evidence of Mrs. Davis, and in such case to make her competent as against the heirs of the

testator, her beneficial interest would have to be avoided." See *Croft* v. *Croft*, 4 Grat. 103, where there were two subscribing witnesses to a will, to one of whom the testator devised a tract of land. The other subscribing witness being dead, the will was probated on the testimony of the devisee witness, whose devise thereupon became void.

Whether the decision in *Davis* v. *Davis* will be followed in Virginia, remains to be seen. It is possible that it might be held that the subscribing witness who takes a benefit under a will is incompetent at the time of the attestation, and that both of the subscribing witnesses should be examined at the probate, if both are alive and within the jurisdiction of the court. The true view of the statute would then be that the words "if the will may not be otherwise proved" have reference to the case where the devisee or legatee is needed as an attesting witness, to make up the number required by law, in which case he is made a competent *attesting* witness by the avoidance of his interest, and he may also be called to testify at the probate of the will. And, conversely, a will may be otherwise proved when there is an extra or superfluous attesting witness, beyond the number required by the statute. This view would assimilate the law of Virginia to that of many of the other States. See Tiedeman, 1 Real Prop., sec. 878, where it is said: "The common law rule is, that if a witness to a will is interested in it as a legatee or devisee, the will is void. But now, in most of the States, it is provided by statute that in such a case the will [shall] be good, but the devise or legacy to the witness shall be void. In some of the States, the devise is declared absolutely void, but generally the devise is void only when there is not a sufficient number of witnesses without the disqualified witness." And in Redfield, Wills, Vol. 1, p. *258, note: "But in many of the American States, the statute only renders the estate of witnesses to a will, who take a beneficial interest under it, void to the extent of the number required to give validity to the instrument. And where supernumerary names appear upon the paper as witnesses, those will first be taken to complete the required number who take no benefit under the will."

C. A. G.